Supreme Court, U.S.
FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1059

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Cobbledick v. *United States*, 309 U.S. 323 3

United States v. *Cid-Molina*, 767 F.2d 1131 3

United States v. *Ghidoni*, 732 F.2d 814, cert. denied, No. 84-270 (Oct. 29, 1984) 2

United States v. *Ryan*, 402 U.S. 530 3

Constitution and statute:

U.S. Const. Amend. V 2, 3

All Writs Act, 28 U.S.C. 1651(a) 2

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1059

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing the district court's orders denying the government's motion to compel petitioner to consent to disclosure of foreign bank records.

1. Petitioner is a target of a grand jury investigation in the Southern District of Texas. On November 16, 1983, petitioner appeared before the grand jury pursuant to a subpoena commanding production of records in his possession and control for foreign bank accounts in the Cayman Islands and Bermuda, countries with bank secrecy laws that generally prohibit disclosure of account records unless the customer consents to such disclosure (Pet. App. 12a-13a). Petitioner produced some of the subpoenaed records and testified that no other records were in his possession or control (*id.* at 13a). In response to questions about the existence or location of additional documents described in

the subpoena, petitioner asserted the Fifth Amendment privilege against compelled self-incrimination (Pet. App. 13a).

On July 2, 1984, the government filed a motion requesting the district court to order petitioner to consent to disclosure of any bank records relating to accounts held or controlled by him at three foreign banks. In connection with that motion, the government submitted proposed consent forms for each of twelve foreign accounts, specifying the account numbers and describing the records requested in the precise language of the subpoena previously issued to petitioner (Pet. App. 15a-16a n.4). The government then served subpoenas on domestic branches of the three foreign banks, but the banks refused to comply with the subpoenas absent petitioner's consent (*id.* at 13a n.2).

On December 6, 1984, the district court denied the government's motion (Pet. App. 12a-24a). The government then moved for reconsideration, submitting a consent form substantially identical to the one approved in *United States* v. *Ghidoni*, 732 F.2d 814 (11th Cir. 1984), cert. denied, No. 84-270 (Oct. 29, 1984). On April 17, 1985, the district court, declining to follow *Ghidoni*, denied the government's motion for reconsideration (Pet. App. 6a-11a). While recognizing that petitioner, "through his own admissions, vitiated any fifth amendment argument as to the foreign accounts that were revealed to contain his name" and that "[i]n essence, [petitioner] has made the existence, possession or control, and authentication of certain foreign accounts a 'foregone conclusion' " (*id.* at 7a (citation omitted)), the court reaffirmed its previous conclusion (*id.* at 15a-17a) that the execution of a consent form would amount to a compelled testimonial communication.

The court of appeals reversed the district court's orders (Pet. App. 1a-3a). The court of appeals first concluded that the All Writs Act, 28 U.S.C. 1651(a), authorized the district

court to entertain the government's motion, because compelling petitioner to execute the consent form "would facilitate the enforcement of the subpoenas served on the banks" (Pet. App. 3a). On the merits, the court of appeals, citing its recent decision in *United States* v. *Cid-Molina*, 767 F.2d 1131 (5th Cir. 1985), concluded that the consent form had no testimonial significance and, therefore, compelling petitioner to sign the form would not violate his Fifth Amendment rights (Pet. App. 3a).

2. Petitioner challenges both the jurisdiction of the district court to entertain the government's motion and the court of appeals' ruling that compelling him to sign the consent form would not violate the Fifth Amendment. Whatever the merits of petitioner's contentions, they are not now ripe for review by this Court.[1] The court of appeals' decision places petitioner in exactly the same position he would have occupied if the district court had ordered him to execute the consent form, but had not yet held him in contempt for failure to do so. In these circumstances, the court of appeals' decision is not final, and petitioner should not be permitted to frustrate the grand jury's investigation any longer. See *United States* v. *Ryan*, 402 U.S. 530 (1971); *Cobbledick* v. *United States*, 309 U.S. 323 (1940). If petitioner chooses to resist the court of appeals' order and the district court holds him in contempt, he will be entitled to present his claims at that time. Accordingly, review by this Court of the court of appeals' decision would currently be premature.[2]

---

[1]It is now more than 18 months since petitioner was first asked to sign the consent form, and the grand jury still does not have all the records it seeks. Interlocutory review at this time would cause additional delay in the grand jury's investigation.

[2]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court so requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1986